

1 any loss as the result of the very small portions of music
2 actually used in ANTM.² *Undisputed Fact No. 13.* Any claim to any
3 part of CBS's profits is entirely too speculative and indirect to
4 sustain any award of profits.

5 5. In addition, Plaintiffs are prevented from recovering
6 statutory damages or attorneys' fees because they had not yet
7 registered their copyrights before the first alleged infringement
8 occurred. *Undisputed Fact No. 13.*

9 III. STANDARD ON SUMMARY JUDGMENT

10 Summary judgment is appropriate where a party can show that,
11 as to any claim or defense, "there is no genuine dispute as to
12 any material fact and the movant is entitled to judgment as a
13 matter of law." FRCP 56(a). Further, under Rule 56(a) a party
14 is entitled to move for partial summary judgment by identifying
15 the part of the claim on which summary judgment is sought. *Id.*

16 One of the principal purposes of the summary judgment "is to
17 isolate and dispose of factually unsupported claims"
18 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548,
19 91 L.Ed.2d 265 (1986).

20 The mere existence of some alleged factual dispute between
21 _____

22 ² Exhibit A to the Complaint, purports to list song titles
23 used as background music for ANTM. The use of "Love You So" (the
24 first song listed), is noted as lasting one minute, ten seconds
25 (from 29 minutes, 10 seconds into the Season 1, Episode 5 program
26 until 30 minutes 20 seconds). Plaintiff has no proof of a causal
27 connection between the use of those 70 seconds of music and any
28 profits made by CBS on that particular program. *Undisputed Fact No. 15.*

1 the parties will not defeat an otherwise properly supported
2 motion; the requirement is that there be no genuine issue of
3 material fact. Material facts are those that may affect the
4 outcome of the case. *United States v. Marmon Holdings, Inc.*,
5 2012 U.S. Dist. LEXIS 173235, at *9-10 (DC Idaho 2012), citing
6 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct.
7 2505, 91 L.Ed.2d 202 (1986).

8 The moving party is entitled to summary judgment if a
9 material fact cannot be disputed. To show the undisputable
10 nature of the fact, a party may show that the adverse party is
11 unable to produce admissible evidence to support the fact. *Id.*,
12 at *10.

13 IV. RICHARDSON'S 13 COPYRIGHTS ARE NOT VALID

14 A plaintiff who claims copyright infringement must show: (1)
15 ownership of a valid copyright; and (2) that the defendant
16 violated the copyright owner's exclusive rights under the
17 Copyright Act, 17 U.S.C. § 501(a). *Ellison v. Robertson*, 357
18 F.3d 1072, 1076 (9th Cir. 2004).

19 In order to obtain a valid copyright registration, an
20 applicant must deposit as a part of his application a "copy" or
21 "copies" of the work. 17 U.S.C. § 408(b)(1) and (2). "We have
22 stated that the registration deposit requirement permits bona
23 fide copies of the original work." *Kodadek v. MTV Networks*, 152
24 F.3d 1209, 1211 (9th Cir. 1998) citing *Seiler v. Lucasfilm, Ltd.*,
25 808 F.2d 1316, 1322 (9th Cir. 1987.)

1 Richardson has refused to provide CBS with any copies of
2 what was deposited with the Copyright Office at the time he made
3 his applications for registration. *Undisputed Fact No. 11.*

4 Instead, he has produced a compact disc, which he created in
5 response to a request to produce, containing 13 instrumental
6 songs (the Richardson Works) and two song with both music and
7 lyrics (the Snyder Works) that he claims were infringed.
8 *Undisputed Fact No. 11.*

9 In the *Seiler* case, the contents of Seiler's work were at
10 issue. The Ninth Circuit held that "[t]here can be no proof of
11 'substantial similarity' and thus of copyright infringement
12 unless Seiler's works are juxtaposed with [movie producer George]
13 Lucas' and their contents compared. Since the contents are
14 material and must be proved, Seiler must either produce the
15 original or show that it is unavailable through no fault of his
16 own. Fed.R.Ev., Rule 1004(1)." *Seiler, supra.* at 1319.

17 Seiler could not do so and neither can Richardson or Snyder.

18 As in *Seiler*, the facts of this case implicate the very
19 concerns that justify the best evidence rule.³ Seiler alleged
20 infringement of his drawings of science fiction fighting machines
21 by the movie "The Empire Strikes Back," but he could produce no
22 documentary evidence of any original drawings existing before the
23

24 ³ The *Seiler* Court found that even though the "best
25 evidence rule" traditionally applied only to writings, its
26 reasoning applied equally to things other than writings. *Seiler,*
supra., at 1319.

1 release of the movie. In short, Seiler claimed that the movie
2 infringed his original drawings, yet he had no proof of those
3 originals. *Seiler, supra.*, at 1319.

4 The *Seiler* Court observed that ". . . the hazards of
5 inaccurate or incomplete duplication are the concerns addressed
6 by the best evidence rule. See 5 Louisell & Mueller, *Federal*
7 *Evidence*, § 550 at 283." *Seiler, supra.*, at 1319.

8 Here, since Richardson will not produce his "deposit
9 copies," his registrations are not completely proven and he
10 cannot prove that any infringement occurred.

11 V. THERE CAN BE NO COPYRIGHT INFRINGEMENT ACTION BY A HOLDER OF
12 A COPYRIGHT AGAINST A LICENSEE OF ANOTHER HOLDER OF THE SAME
13 COPYRIGHT

14 It is well-settled that, generally, joint copyright owners
15 are deemed "tenants in common," with each owning an undivided
16 interest in the entire copyright, and that each owner is entitled
17 to all of the exclusive rights held by copyright owners,
18 including the right to issue non-exclusive licenses of the work.
19 *Chirco v. Gateway Oaks, LLC*, 2005 U.S. Dist. LEXIS 43081, 2005 WL
20 2284218, *5-6 (E.D. Mich. 2005) (citing, among others, *Nimmer on*
21 *Copyright* § 6.09-6.10).

22 Therefore, "a license from a co-owner of a copyrighted work
23 is a defense to a claim of copyright infringement brought by any
24 other co-owner." *Bridgeport Music, Inc. v. DJ Yella Muzick*, 99
25 Fed. Appx. 686, 691 (6th Cir. 2004; *Piantadosiv v. Loews, Inc.*,

1 137 F.2d 534, 537 (9th Cir. 1943). That is, "a joint owner of a
2 copyright . . . may grant licenses to a jointly-owned work
3 without the consent of the other joint owners," and the licensee
4 may exploit that work, therefore, without the explicit permission
5 of other co-owners of the work, although the licensor may be
6 required to account to the other co-owners of the copyright.
7 *Thompson v. Looney's Tavern Productions, Inc.*, 204 Fed. Appx.
8 844, 850 (11th Cir. 2006); *Bridgeport Music Inc. v. Dimension*
9 *Films*, 230 F. Supp. 2d 830, 835 (M.D. Tenn. 2002); *Geshwind v.*
10 *Garrick*, 734 F. Supp. 644, 651 (S.D.N.Y. 1990) ("a joint owner of
11 a work does not need the permission of his joint owner to use or
12 license the work, and neither he nor a party to whom he gives
13 permission to use the work can be held liable to the other owner
14 for infringement.")

15 As to the Snyder Works, there is no dispute that what was
16 licensed was the instrumental version of the two works that Jeeve
17 created before the Snyder Works were produced. *Undisputed Fact*
18 *No. 15.*

19 As noted above, Richardson concedes that Jeeve is the co-
20 owner of all 13 copyrights in the Richardson Works and that the
21 only way that the music could have been supplied for use in ANTM
22 was through PEN, who was authorized by Jeeve to grant non-
23 exclusive licenses for all 13 of the Richardson Works. *Undisputed*
24 *Fact Nos. 1, 5, and 6.*